

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 12,149

BRIEF FOR PETITIONER AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1954

FILED

MAY 21 1954

Joseph W. Stewart
CLERK

ESTATE OF GUSTAVE W. FORSBERG, deceased, etc.,
Petitioner,

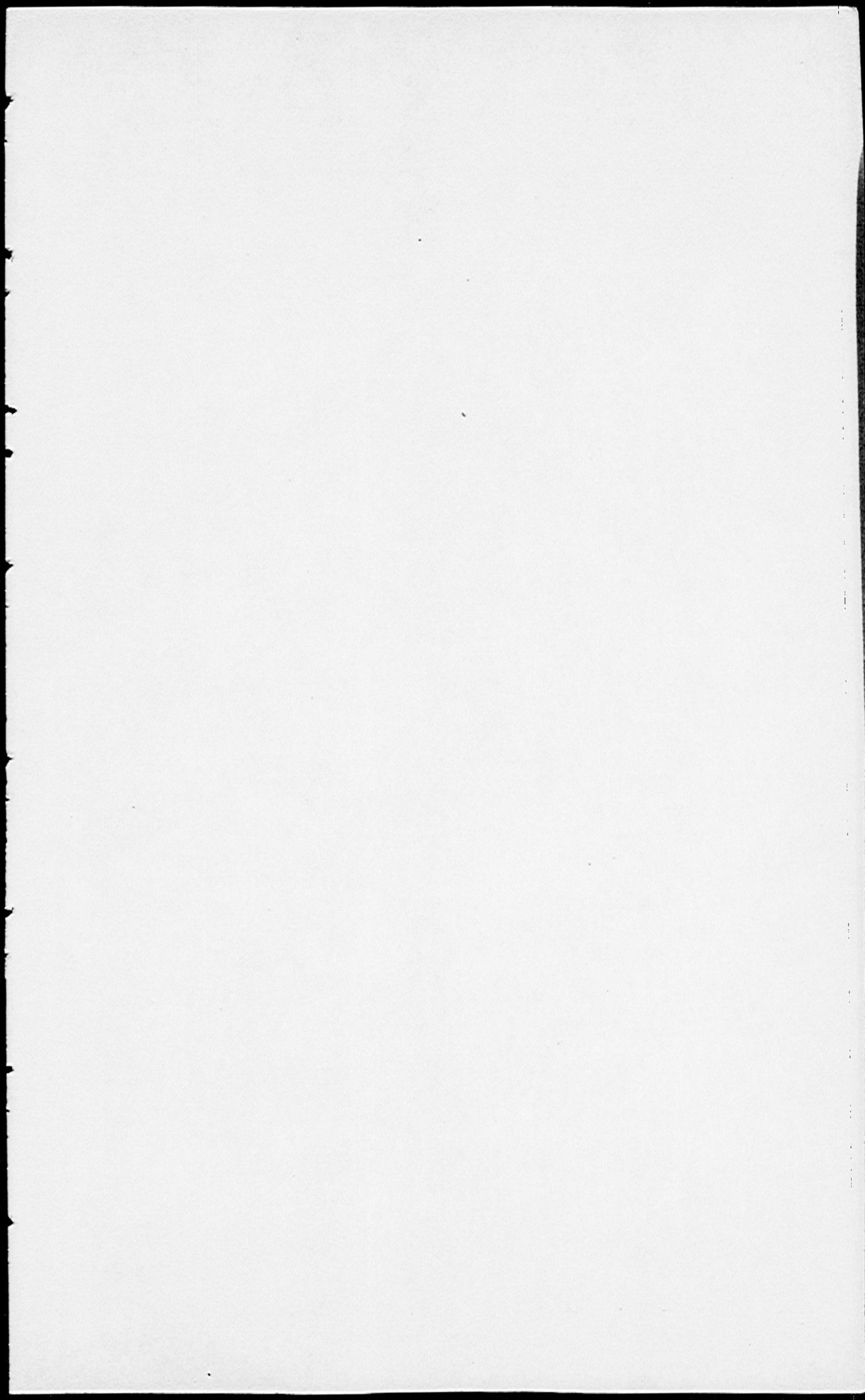
v.

DISTRICT OF COLUMBIA,

Respondent.

Petition for Review of Decision of the District of
Columbia Tax Court

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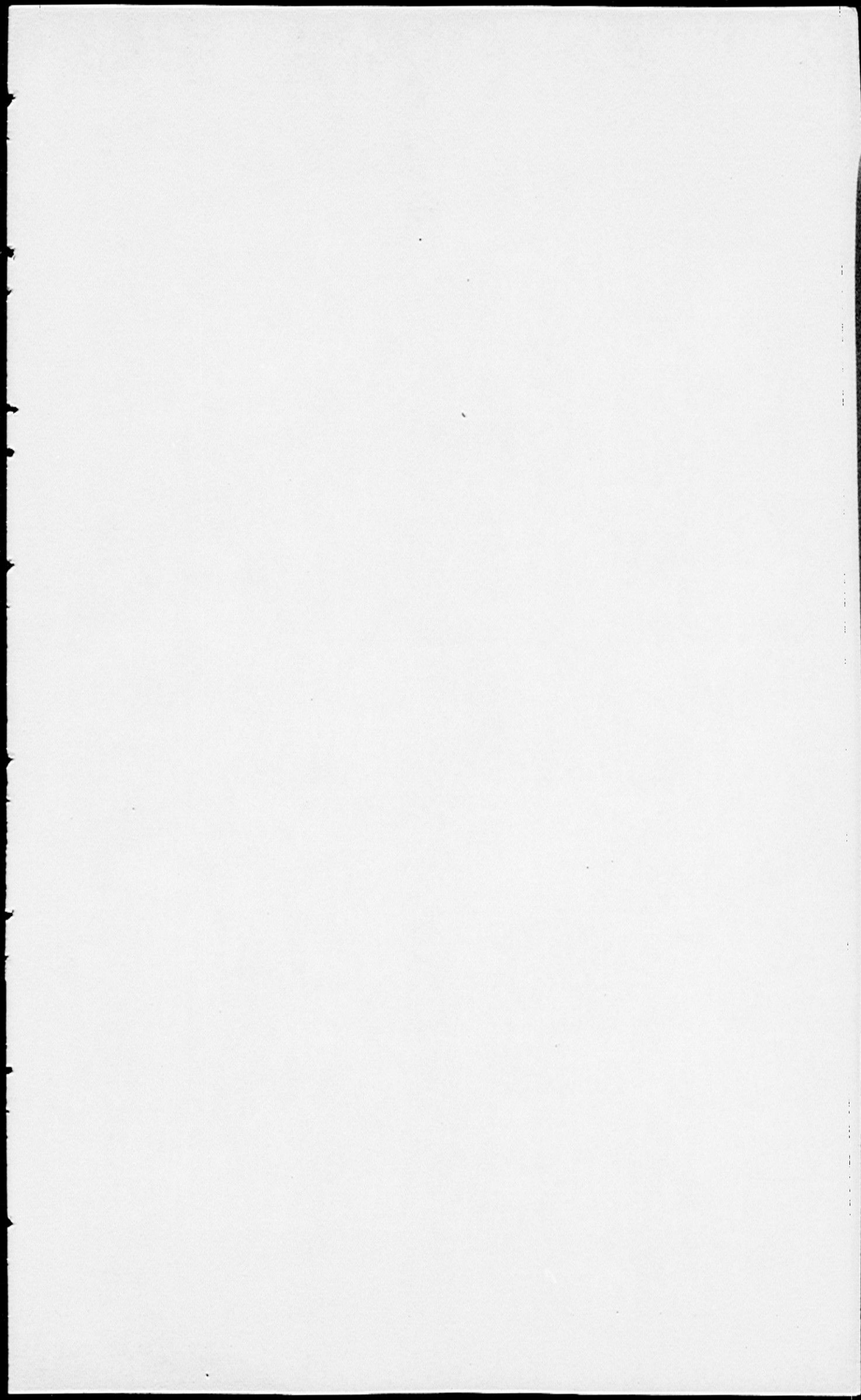
I. THE QUESTIONS PRESENTED

1. Did the District of Columbia Tax Court err in sustaining a denial by the Assessor for the District of Columbia of a claim for refund of estate taxes filed by a taxpayer under a provision of law requiring such claim to be filed within two years from the date on which such tax was paid, where such claim is based upon a claim for refund of Federal estate taxes filed with the Internal Revenue Service but which had not been acted upon at the time the claim for refund was filed with the District Government, on the grounds that such claim was prematurely filed because the claim for refund filed with the Federal Government and upon which the claim filed with the District Government was based, had not been acted upon?

2. Did the District of Columbia Tax Court err in holding that a claim for refund filed with the Assessor for the District of Columbia, based upon a claim for refund of Federal estate taxes which had not yet been acted upon by the Internal Revenue Service, failed to state the specific grounds upon which the claim was founded?

3. Did the District of Columbia Tax Court err in denying petitioner's prayer that the case be placed on the suspense docket pending final determination of petitioner's pending claim for refund of Federal estate taxes filed with the Internal Revenue Service?

It is petitioner's contention that these questions require an answer in the affirmative.



II. INDEX

	PAGE
I. The question presented.....	Flyleaf
II. Jurisdictional statement	1
IV. Statement of the case.....	2
V. Statutes involved	5
VI. Statement of points.....	8
VII. Summary of argument.....	8
VIII. Argument:	
1. The action of the Tax Court in dismissing petitioner's appeal, deprives petitioner of a specific right created by law.....	9
2. The claim for refund and petitioner's ap- peal to the Tax Court from the denial thereof, were not premature.....	9
3. Petitioner's claim for refund set forth the specific grounds upon which the claim was founded	11
4. The action of the Assessor in denying pe- titioner's refund claim was arbitrary, capri- cious and unwarranted.....	12
5. It was an abuse of discretion by the Tax Court in refusing to place the case on the suspense calendar	12
6. This is a case of first impression and must be decided on principles of logic and fair- ness	13
IX. Conclusion	15

Table of Cases

Ford Motor Co. v. Mahone, 205 F.2d 267.....	15
Hendelberg v. Goldstein, et al, U. S. Court of Ap- peals for the District of Columbia Circuit, Case No. 11,751, decided March 11, 1954.....	13
Jackson v. Sims, 201 F.2d 259.....	15
U. S. v. Brown, 333 U.S. 18, 92 L ed 442.....	15

Statutes

Act of August 17, 1937, 50 Stat. 690, ch. 690 as amended	1
Act of August 17, 1937, 50 Stat. 683, ch. 690, as added and amended	3, 5
Act of July 10, 1952, 66 Stat. 543, ch. 649.....	2, 5, 6, 7, 9, 10, 11, 12, 13
Title 47, D. C. Code, Secs. 1608-1615.....	5
Title 47, D. C. Code, Sec. 1608.....	5, 11
Title 47, D. C. Code, Sec. 1613.....	5, 14
Title 47, D. C. Code, Sec. 1614.....	3, 6, 13
Title 47, D. C. Code, Sec. 1615.....	6

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,149

ESTATE OF GUSTAVE W. FORSBERG, deceased, etc.,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

**Petition for Review of Decision of the District of
Columbia Tax Court**

III. JURISDICTIONAL STATEMENT

Under date of October 13, 1953, petitioner filed with the Office of the Assessor, Inheritance and Estate Tax Division, District of Columbia, a claim for refund of overpayment of estate taxes (App. 8A), which claim was denied on October 15, 1953, by the Assistant Administrator, Inheritance and Estate Tax Division (App. 10A). On December 29, 1953, petitioner filed with the District of Columbia Tax Court a petition appealing from the denial of her claim for refund (App. 4A), and thereafter on January 18, 1954, filed a motion to amend her

petition (R. 11) to show jurisdiction of the District of Columbia Tax Court as being based upon the Act of August 17, 1937, 50 Stat. 690, ch. 690, as added May 16, 1938, 52 Stat. 371, ch. 223, as amended by the Act of July 26, 1939, 53 Stat. 1108, ch. 367, as amended by the Act of July 10, 1952, 66 Stat. 543, ch. 649, instead of upon the Act cited in her petition as originally filed, which motion was subsequently granted on February 1, 1954, by Order of the Tax Court (App. 17A).

Under date of February 1, 1954, the District of Columbia Tax Court entered an Order dismissing the petition for lack of jurisdiction (App. 18A). On February 16, 1954, under the provisions of the District of Columbia Revenue Act of August 17, 1937, as added and amended, *supra*, petitioner filed in the District of Columbia Tax Court her petition to this Honorable Court for review of the decision of the Tax Court (App. 2A), and on March 22, 1954, filed with the Clerk of this Honorable Court the transcript of record and the case was duly docketed.

IV. STATEMENT OF THE CASE

Petitioner is the duly qualified Administratrix, CTA, DBN, of the Estate of Gustave W. Forsberg, deceased, and a Distributee named in the will of said decedent; she is also the duly qualified Administratrix of the Estate of Grace D. Forsberg, deceased, the surviving spouse of Gustave W. Forsberg, and a distributee named in his will; and petitioner is also the sole Distributee of the Estate of Grace D. Forsberg, deceased, by operation of law, being the sole heir-at-law and next-of-kin (App. 2A, 4A).

This is an appeal from a decision of the District of Columbia Tax Court dismissing for lack of jurisdiction a petition for review of a denial of a claim for refund of

estate taxes filed by petitioner with the Office of the Assessor for the District of Columbia (App. 2A).

The United States Internal Revenue Service (then the Bureau of Internal Revenue) assessed against the Estate of Gustave W. Forsberg, deceased, a deficiency in estate taxes. The Assessor of Taxes for the District of Columbia, allegedly acting under the District of Columbia Revenue Act of August 17, 1937, 50 Stat. 683, ch. 690, as amended July 26, 1939, 53 Stat. 1115, ch. 367 (Sec. 1614, Title 47, D. C. Code), on February 16, 1951, assessed an additional estate tax in the amount of \$6,806.73 against this estate (R. 6), which tax, plus interest of \$476.47 was paid by petitioner on October 15, 1951 (R. 6).

On March 2, 1953, petitioner filed a claim for refund of overpayment of Federal estate taxes with the Internal Revenue Service, based upon objection to the Commissioner of Internal Revenue's (now Director of Internal Revenue) increase in valuation of certain securities by \$38,512.50, upon evidence that a later recovered asset was in the amount of \$1,805.00 instead of \$2,000 as originally reported, and that a disallowed co-executrix commission in the amount of \$6,098.26 had been duly paid and was thus a proper deductible expense (App. 6A, 9A).

On October 13, 1953, petitioner filed with the Office of the Assessor for the District of Columbia a claim for refund of overpayment of District of Columbia estate taxes in the amount of \$2,142.96, together with interest thereon from October 15, 1951, plus a claim for refund of \$150.00 representing excessive interest paid on October 15, 1951, plus interest on that amount from that date (App. 8A). This claim for refund was based upon the claim for refund of Federal estate taxes, which claim had not then (and has not yet) been acted upon, but which if granted would reduce the amount of estate taxes payable to the District of Columbia by the amount for which the claim for refund was filed.

Under date of October 15, 1953, petitioner was notified that her claim for refund and interest had been denied, but the notification failed to set forth the reason or reasons for such disallowance (App. 10A).

On December 29, 1953, a petition was filed in the District of Columbia Tax Court appealing from such denial (App. 4A). On January 14, 1954, respondent filed a motion to dismiss the petition, on the grounds that the Court did not have jurisdiction to hear or determine any matter presented in the petition, that petitioner had failed to exhaust her administrative remedy, and that the petition failed to state a claim upon which relief could be granted (R. 10).

On January 18, 1954, petitioner filed a motion to amend her petition to show the proper statute under which her petition was filed (R. 11), the original petition, through typographical error, having erroneously cited the statute under which relief was sought. And on January 26, 1954, petitioner filed her answer to respondent's motion to dismiss, to which answer respondent filed a reply memorandum on January 22, 1954.

On February 1, 1954, Judge J. V. Morgan of the District of Columbia Tax Court, rendered a memorandum relating to respondent's motion to dismiss and petitioner's motion to amend (App. 12A), entered his Order granting petitioner's motion to amend (App. 17A), and entered his Order granting respondent's motion and dismissing the petition for lack of jurisdiction (App. 18A). The reasons assigned for dismissal were, substantially: (1) that the claim for refund was properly denied because at the time of denial there was no way to determine the validity or propriety of the petitioner's claim, since the claim was contingent upon a favorable outcome of petitioner's claim for refund filed with the Internal Revenue Service; (2) that the proceeding before the District

of Columbia Tax Court was premature because at the time the petition was filed, it could not be said that the Assessor erred in denying petitioner's claim for refund, in that it may turn out that the Internal Revenue Service is correct in assessing the deficiency; and (3) that the petition must be dismissed for the reason that the claim for refund, as far as the claimed overvaluation of property is concerned, did not state the specific grounds upon which the claim was founded, as required by Section 14(a) of Title IX of the District of Columbia Revenue Act of 1937, as added by the Act of June 10, 1952, *supra*.

On February 16, 1954, a petition for review by this Honorable Court of the decision of the District of Columbia Tax Court was filed with the District of Columbia Tax Court (App. 2A), and thereafter on March 22, 1954, the transcript of record was filed with the Clerk of this Court and the case docketed.

V. STATUTES INVOLVED

1. The authority of the District of Columbia to assess and collect estate taxes in this case was provided for by Secs. 1608 to 1615, Title 47, D. C. Code, 1940 Edition (same in 1951 Edition) (Act of August 17, 1937, 50 Stat. 683, ch. 690, title V, as added and amended), the pertinent portions of which provide:

"Sec. 1608. In addition to the taxes imposed by sections 47-1601 to 47-1607, there is hereby imposed upon the transfer of the estate of every decedent who, after this chapter becomes effective, shall die a resident of the District, a tax equal to eighty per centum of the Federal estate tax imposed by section 810, Title 26, U. S. Code, as amended, or as hereafter amended or reenacted."

"Sec. 1613. Every executor or administrator of the estate of a decedent dying a resident of the District * * *

shall, within sixteen months after the death of the decedent file with the assessor a copy of the return required by U. S. Code, title 26, sections 820, 821(a) (b) (c), and 864 (a) (b) (c) * * *, and shall within thirty days after the date of any communication from the Commissioner of Internal Revenue, confirming, increasing, or diminishing the tax shown to be due, file a copy of such communication with the assessor * * *."

"Sec. 1614. The assessor shall, upon receipt of the return and accompanying affidavit, assess such amount as he may determine, from the basis of the return, to be due the District. Upon receipt of a copy of any communication from the Commissioner of Internal Revenue, herein required to be filed, the assessor shall make such additional assessment or shall make such abatement of the assessment as may appear proper."

"Sec. 1615. The estate taxes imposed by sections 47-1608 to 47-1615 shall be paid to the collector of taxes within seventeen months after the death of the decedent: * * * Provided further, That any additional assessment found to be due under section 47-1614 shall be paid to the collector of taxes within thirty days after the determination of such additional assessment by the assessor."

2. The material portions of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (amending the District of Columbia Revenue Act of August 17, 1937, as added and amended), under the provisions of which petitioner filed her claim for refund with the Assessor, and filed her appeal to the Tax Court, provide:

"Sec. 14. (a) Where there has been an overpayment of any tax, the amount of such overpayment shall be refunded to the taxpayer. No such refund shall be allowed after two years from the date the tax is paid unless before the expiration of such period a claim therefor is filed by the taxpayer. * * * Every claim for refund must be in

writing, under oath, must state the specific grounds upon which the claim is founded and must be filed with the Assessor. If the Assessor disallows all or any part of the claim for refund, he shall send to the taxpayer by registered mail a notice of such disallowance. Within ninety days after the mailing of the notice of disallowance, * * *, the taxpayer may appeal to the Board, in the same manner and to the same extent as set forth in sections 3 and 4 of this title. * * *.

“(b) In any proceeding under this title the Board of Tax Appeals for the District of Columbia¹ shall have jurisdiction to determine whether there has been any overpayment of tax and to order that such overpayment be credited or refunded to the taxpayer: Provided, That a timely refund claim has been filed. * * *.”

3. The material portions of the Act of July 10, 1952, *supra*, under which the petition to this Honorable Court was filed, provide:

“Sec. 3. (b) Subsection (a) of section 4 of title IX of such Act (the District of Columbia Revenue Act of 1937, as added by the Act of May 16, 1938, and as amended by the Act of July 26, 1939), is amended to read as follows:

“(a) The decision of the Board may be reviewed by the court as hereinafter provided if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. * * *. Upon such review the court shall have the power to affirm, modify or reverse the decision of the Board with or without remanding the case for hearing as justice may require. * * *.”

Sec. 8 of the Act of August 17, 1937, *supra*, provides:

“The word ‘court’ shall mean the United States Court of Appeals for the District of Columbia.”

¹ Note: The Board of Tax Appeals was changed to the District of Columbia Tax Court by Sec. 5 of the Act of July 10, 1952, *supra*.

VI. STATEMENT OF POINTS

1. The District of Columbia Tax Court erred in granting respondent's motion to dismiss petitioner's appeal.

2. The Tax Court erred in holding petitioner's claim for refund was properly denied by the Office of the Assessor because at the time of denial there was no way to determine the validity or propriety of the petitioner's claim.

3. The Tax Court erred in holding that the proceeding before it was premature, because at the time the petition was filed with the Tax Court it could not be said that the Assessor erred in denying the claim for refund in that it may turn out that the Internal Revenue Service is correct in assessing the deficiency.

4. The Tax Court erred in dismissing the petition for the reason that the claim for refund did not state the specific grounds upon which the claim was founded.

5. The Tax Court erred in denying petitioner's prayer that the case be placed on the suspense docket pending final determination of petitioner's pending claim for refund of Federal estate taxes filed with the Internal Revenue Service.

6. The Tax Court erred in denying petitioner's appeal.

VII. SUMMARY OF ARGUMENT

1. The action of the Tax Court in dismissing petitioner's appeal, deprives petitioner of a specific right created by law.

2. The claim for refund and petitioner's appeal to the Tax Court from the denial thereof, are not premature.

3. Petitioner's claim for refund set forth the specific grounds upon which the claim was founded.

4. The action of the Assessor in denying petitioner's refund claim was arbitrary, capricious and unwarranted.

5. It was an abuse of discretion by the Tax Court in refusing to place the case on the suspense calendar.

6. This is a case of first impression and must be decided on principles of logic and fairness.

VIII. ARGUMENT

1. The Action of the Tax Court in Dismissing Petitioner's Appeal, Deprives Petitioner of a Specific Right Created by Law.

The effect of the District of Columbia Tax Court's action in granting respondent's motion to dismiss petitioner's appeal, is to leave petitioner without means of availing herself of a remedy provided for by law. The Act of July 10, 1952, 66 Stat. 543, ch. 649, under which petitioner must proceed for a refund—if she is to proceed at all—requires that any such claim must be filed within two years from the date on which the tax was paid. Here petitioner filed her claim for refund two days before the two year period of limitation expired. The logic of the situation thus indicates that it was error for the Tax Court to dismiss the petition, thereby depriving petitioner of a specific right created by law.

2. The Claim for Refund and Petitioner's Appeal to the Tax Court From the Denial Thereof, Were Not Premature.

That the claim for refund filed by petitioner with the Office of the Assessor for the District of Columbia, and petitioner's appeal to the Tax Court from the denial thereof, were not premature, is apparent from the language of the Act itself.

As has been stated, the Act of July 10, 1952, *supra*, specifically provides at Sec. 14(a) that "No such refund shall be allowed after two years from the date the tax is paid unless before the expiration of such period a claim therefor is filed by the taxpayer." How then can it be said that a claim for refund filed within such statutory period is premature, when if, as in the instant case, such claim had been filed subsequent to such two year period, respondent would have the right, and it must be assumed would avail itself of that right, to use the two year limitation as a bar to any such claim.

Furthermore, said Act also provides in the same section, that "Within ninety days after the mailing of the notice of disallowance (of a claim for refund), * * *, the taxpayer may appeal to the Board (Tax Court)." If petitioner were to avail herself of the protection of this provision, she had no alternative but to file with the Tax Court, within the time prescribed, her appeal from the denial of her claim. Otherwise, she would have lost any rights she may have had to appeal from such wrongful denial.

How, then, under the circumstances of the case and the specific requirements of law, can it be said that either petitioner's claim for refund, or her appeal to the Tax Court from the denial thereof, were premature?

It is quite apparent that should this Court sustain the Assessor and the Tax Court on this point, and the claim for refund filed with the Federal Government should be later allowed, respondent would refuse to honor a new claim for refund on the ground that the two year period of limitation had run.

If the contentions of the respondent, as sustained by the Tax Court, are correct, then petitioner, in effect, is faced with the paradoxical situation of being both too early and too late—and all at the same time.

3. Petitioner's Claim for Refund Set Forth the Specific Grounds Upon Which the Claim Was Founded.

Respondent's contention, sustained by the Tax Court, that petitioner's claim for refund did not set forth the specific grounds upon which it was based, is without merit. The District of Columbia estate tax is based upon eighty per centum of the Federal estate tax, as provided for by Sec. 1608, Title 47, D. C. Code—it is not based upon a determination of the value of specific items or assets of an estate and allowable deductions, as is the Federal Tax. The District tax can only be imposed after the Federal Government has determined the value of an estate for purposes of assessing a Federal estate tax, which naturally can only be done by placing a valuation on the specific items or assets constituting the estate and by allowing or disallowing claimed deductions. Once the Federal Government arrives at the value of the estate for estate tax purposes, it levies the required tax. The District of Columbia estate tax is then based upon eighty per cent of the amount of the Federal estate tax. As stated, it is not based upon the value of the specific items and deductions making up the estate. Therefore, it is of no importance and no concern of the District whether the Federal Government places a value of one dollar or a million dollars on a specific item, or allows or disallows certain claimed deductions. Thus, a claim for refund of overpayment of estate tax filed with the District, complies with the statute if it alleges that the amount of the District estate tax assessed and collected exceeded eighty per centum of the Federal estate tax.

It is clear that when petitioner filed her claim stating that if the claim for refund filed with the Federal Government is granted, it "will reduce the 80% credit paid the District of Columbia," she did state the specific grounds upon which the claim was founded, as required by Sec. 14(a) of the Act of July 10, 1952, *supra*.

4. The Action of the Assessor in Denying Petitioner's Refund Claim Was Arbitrary, Capricious and Unwarranted.

The whole procedure insofar as petitioner is concerned, indicates a complete refusal on the part of respondent to recognize the rights of a taxpayer. Petitioner's claim was filed with the Assessor on October 13, 1953, and same was summarily denied two days later on October 15, 1953, notwithstanding the fact that the Assessor has at least six months within which to act on such claim, Sec. 14(a) of the Act of July 10, 1952, *supra*, providing:

"Within ninety days after the mailing of the notice of disallowance, if the claim is acted upon within six months after the filing thereof, or within ninety days *after the termination of such six months period*, if the claim is not acted upon within such period, the taxpayer may appeal to the Board * * *." (Emphasis supplied).

Subsequently, when petitioner appealed to the Tax Court, respondent refused to agree to have the case placed on the suspense calendar as prayed for by petitioner.

Respondent's entire course of action with respect to this taxpayer has been arbitrary, capricious and unwarranted, and is an attempt to deprive petitioner of her lawful rights, by the pinching of technicalities.

5. It Was an Abuse of Discretion by the Tax Court in Refusing to Place the Case on the Suspense Calendar.

It is petitioner's contention that it was a manifest abuse of discretion on the part of the Tax Court in failing to place the appeal filed by petitioner on the suspense calendar as prayed for in her petition. This would have had the effect of protecting the rights of petitioner and would have avoided multitudinous litigation. If it had

subsequently turned out that petitioner's Federal claim was denied, then the petition could have been dismissed for failure to state a cause of action. Where would anyone, including respondent, have been prejudiced. If on the other hand it turned out that the Federal claim was granted, in whole or in part, then certainly respondent could not be said to be prejudiced, since it would not have to do anything not required by law—Sec. 1614, Title 47, D. C. Code, providing that “upon receipt of any communication from the Commissioner of Internal Revenue, herein required to be filed, the assessor shall make such additional assessment *or shall make such abatement of the assessment* as may appear proper.” (Emphasis supplied).

6. This is a Case of First Impression and Must be Decided on Principles of Logic and Fairness.

As far as petitioner has been able to determine, this is a case of first impression relating to the interpretation of the refund provisions of the Act of July 10, 1952, *supra*, with respect to estate taxes. Petitioner has been unable to find any precedents which would support her position and that would be applicable to the situation here, or from which any reasonable and logical analogy could be drawn. Therefore, it is petitioner's position that the questions raised by this case must be resolved by the application of logic and a sense of fairness, uninhibited by the legal niceties and technicalities advocated by respondent. In this respect, it is interesting to note that this Court in the recently decided case of *Hendelberg v. Goldstein, et al*, No. 11,751, decided March 11, 1954, did not cite a single case in support of its opinion.

The need for application of logic and reason to a situation such as here presented, is best exemplified by a comparison of the operations of the taxing authorities under the Federal estate tax law and the operations of

the taxing authorities under the District inheritance and estate tax law.

In the case of the Federal estate tax operation, it takes years to arrive at a final settlement or determination of estate tax liability where any disputable questions arise. In the instant case, the original Federal estate tax return was filed on or about October 9, 1947, and the tax calculated thereon timely paid. A deficiency assessment was levied on September 28, 1950, and the tax was paid on March 5, 1951. A timely claim for refund was filed on March 2, 1953, which claim is still pending. A period of over six and a half years has now elapsed since the filing of the original return, and still final determination or settlement has not been made.

In the case of the District of Columbia tax, a copy of the Federal estate tax return was filed on October 9, 1947, with the Assessor for the District of Columbia, as required by Sec. 1613, Title 47, D. C. Code, and the tax timely paid. On February 14, 1951, notice of Federal estate tax adjustment was filed, and on February 16, 1951, an additional estate tax was assessed, which was paid on October 15, 1951. On October 13, 1953, the claim for refund in dispute here was filed, which claim was denied two days later on October 15, 1953.

The statute of limitations has not yet run on the rights of petitioner against overpayment of Federal estate taxes, but as regards petitioner's right against overpayment of District estate taxes, petitioner's claim for refund was filed two days before the statute expired.

The taxing authorities of the District should not be allowed to take advantage of the time lag between the longer Federal tax operation and the shorter District tax operation, to collect from a taxpayer a sum of money

which is not legally owing, especially when there is nothing that the taxpayer can do to expedite settlement of Federal tax matters within the period allowed the Internal Revenue Service by law.

It is the general rule of law that statutes must be given reasonable interpretations, and interpretations leading to absurd consequences must be avoided. *Ford Motor Co. v. Mahone*, 205 F. 2d 267; *U. S. v. Brown*, 333 U. S. 18, 92 L ed 443. The words of a statute will not be given a strained or technical meaning, if to do so would defeat the legislative purpose. *Jackson v. Sims*, 201 F. 2d 259. Certainly the interpretation of the statute contended for by respondent would lead to the absurd consequence of depriving petitioner of a right created by law, and would certainly defeat the legislative purpose of the enactment.

The District of Columbia estate tax statute is a windfall enactment, which should not be converted into a further windfall by a rejection of just claims for refund of overpayment thereof by technical procedural objections.

IX. CONCLUSION

In view of the foregoing, petitioner prays that:

- (a) The Order of the District of Columbia Tax Court dismissing petitioner's petition, be vacated and set aside.
- (b) This matter be remanded to the District of Columbia Tax Court with instructions to place the case on the suspense calendar pending final action by the Internal Revenue Service on petitioner's claim for refund of estate taxes filed with the Internal Revenue Service.
- (c) The Court order such other and further relief as the Court may deem necessary and proper, and

as the circumstances of the case may equitably require.

Respectfully submitted,

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APPENDIX



INDEX

	PAGE
Petition for Review of a Decision of the District of Columbia Tax Court.....	2 A
Petition	4 A
Exhibit "B"	8 A
Claim for Refund of Inheritance and Estate Taxes Paid	8 A
Exhibit "C"	10 A
Petition (As Amended).....	11 A
Memorandum Relating to Respondent's Motion to Dismiss and Petitioner's Motion to Amend the Petition	12 A
Order Granting Petitioner's Motion to Amend the Petition	17 A
Order Dismissing Petition for Lack of Jurisdic- tion	18 A
Docket Entries	18 A



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,149

ESTATE OF GUSTAVE W. FORSBERG, deceased, etc.,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

Petition for Review of Decision of the District of
Columbia Tax Court,

JOINT APPENDIX

Filed Feb 16 1954

District of Columbia Tax Court

*Petition for Review of a Decision of the
District of Columbia Tax Court*

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. Olga Forsberg Donnelly, Administratrix, CTA, DBN of the Estate of Gustave W. Forsberg, deceased, and Distributee thereof, and as Administratrix of the Estate of Grace D. Forsberg, deceased, and Distributee thereof, petitions for a review by the United States Court of Appeals for the District of Columbia Circuit of the decision of the District of Columbia Tax Court made in the above entitled proceeding:

2. The decision of which review is sought, affirmed a denial of a claim for refund of additional estate taxes assessed on February 16, 1951, and paid on October 15, 1951.

3. A claim for refund was timely filed with the office of the Assessor, District of Columbia, on October 13, 1953, within the two year period provided for by law. Said claim was based upon a claim for refund of overpayment of Federal estate tax; the claim for refund of Federal estate tax being based upon objection to the Commissioner of Internal Revenue's increase in valuation of certain securities, upon evidence that a later recovered asset was in a lesser amount than originally reported, and upon the disallowance of a co-executrix's commission, which had not been paid at the time of audit, but which was subsequently paid. The claim for

22 refund of Federal estate taxes, although duly and timely filed, has not as yet been acted upon by the Internal Revenue Service, but if granted will reduce the

eighty per cent credit paid the District of Columbia and entitle petitioner to a refund of overpayment of District of Columbia estate taxes as set forth in her claim.

4. The claim for refund of District estate taxes was denied by the Office of the Assessor for the District of Columbia on October 15, 1953, and an appeal was taken on December 29, 1953, within the time prescribed by law, to the District of Columbia Tax Court.

5. The District of Columbia Tax Court on February 1, 1954, entered its Order granting the District of Columbia's motion to dismiss the petition for lack of jurisdiction, on the grounds that:

(a) At the time the claim for refund was filed with the Office of Assessor, D. C., there was no way to determine the validity of propriety of the petitioner's claim, since the Internal Revenue Service had not yet acted upon petitioner's claim for a refund of Federal estate taxes, and, therefore, petitioner's claim for refund of District estate taxes was premature;

(b) The claim for refund filed with the Office of Assessor, D. C., as far as the claimed overvaluation of property is concerned, did not state the specific grounds upon which the claim was founded, as required by the District of Columbia Revenue Act.

6. Jurisdiction of this Court is based upon the District of Columbia Revenue Act of August 17, 1937, 50 Stat. 637, as added May 16, 1938, 52 Stat. 371, as amended by the Act of July 26, 1939, 53 Stat. 1108, as amended by the Act of July 10, 1952, 66 Stat. 543.

/s/ Horace J. Donnelly, Jr.
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1

Filed Dec 29 1953

District of Columbia Tax Court

DISTRICT OF COLUMBIA TAX COURT

Estate of Gustave W. Forsberg, deceased

Olga Forsberg Donnelly, Administratrix, CTA, DBN,
and Distributee thereof, and as
Administratrix of the Estate of Grace D. Forsberg,
and Distributee thereof

Petitioner

vs.

District of Columbia

Respondent

Docket No. 1413

Petition

The above-named petitioner appeals from a denial of claim for refund of estate taxes assessed and collected against the above-captioned estate, and avers as follows:

1. Jurisdiction of this Court is based upon the Act of July 16, 1947, as amended, Title 47, Section 2403, District of Columbia Code, 1951 Edition. Petitioner is the Administratrix, CTA, DBN, of the Estate of Gustave W. Forsberg, deceased, Administration No. 67,948, in the United States District Court for the District of Columbia, holding Probate Court, and a distributee named in the will. Petitioner is also Administratrix of the Estate of Grace D. Forsberg, deceased, Administration No. 68,924, in the United States District Court for the District of Columbia, Holding Probate Court, which decedent was the remaining distributee under the will of Gustave W. Forsberg, deceased; and petitioner is the sole distributee of the Estate of Grace D. Forsberg by operation of law, as sole heir-at-law and next-of-kin of said

intestate decedent. The Estate of Gustave W. Forsberg, deceased is designated as Estate No. 25324 for District of Columbia Estate and Inheritance Tax purposes. Petitioner has offices at 730 Fifteenth Street, N. W., Washington 5, D. C.

2. The tax in controversy is an overpayment of additional estate tax in the amount of \$2,142.96, plus interest in the amount of \$150. Payment of additional estate tax in the amount of \$6,806.73, plus interest in the amount of \$476.47, was made on October 15, 1951, on demand of the Office of the Assessor, District of Columbia, as shown by photographic copy of paid additional estate tax bill attached hereto as Exhibit "A". A Claim for Refund of overpayment of estate taxes in the amount of \$2,142.96, plus interest in the amount of \$150.00 levied thereon, plus interest on the total from October 15, 1951, was filed on October 13, 1953, with the Office of the Assessor, Inheritance and Estate Tax Division, as shown by copy of said claim attached hereto as Exhibit "B". The Claim for Refund was denied by letter dated October 15, 1953, from William R. Mason, Assistant Administrator, Inheritance and Estate Taxes, as shown by photographic copy of said letter attached hereto as Exhibit "C".

3. The assignment of errors which petitioner alleges have been committed by the taxing authority are as follows:

(1) The taxing authority erred in denying petitioner's claim for refund of excess of additional estate taxes and interest assessed and paid.

(2) The taxing authority erred in assessing and levying additional estate taxes in an amount in excess of \$2,142.96 of the amount actually due, and in assessing and levying interest from February 16, 1951 to October

15, 1953 in the amount of \$150.00 on such excessive amount.

4. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) The assessment of additional estate tax in the amount of \$6,806.73 (plus interest in the amount of \$476.47), was levied by the Office of the Assessor as the balance of the 80% credit determined by the Bureau of Internal Revenue as a credit for payment of local succession taxes, said credit being figured upon the total basic Federal estate tax assessed against this estate by the Commissioner of Internal Revenue, including a deficiency of said tax due to a determination of under assessment resulting from increased valuations placed upon real property and securities of said decedent, later recovered assets, and disallowance of a claimed deduction of \$6,098.26 due as commission to the former co-executrix of this estate by virtue of the order of the Probate Division of the United States District Court for the District of Columbia, which had not been paid at the time of audit, but which has since been paid by this estate.

(b) Claim for refund of overpayment of Federal Estate Tax has been duly and timely filed, based upon objection to the Commissioner of Internal Revenue's increase in valuation of certain securities by \$38,512.50; by holding that date of death and not the optional valuation date elected by petitioner's predecessor, was the governing date for determination of valuation; upon evidence that a later recovered asset was in the amount of \$1,805.00 instead of \$2,000.00 as originally determined; and that the disallowed co-executrix's commission in the amount of \$6,098.26 had been duly paid and thus is a proper deductible expense of administration.

(c) The claim for refund referred to in (b) above, has not as yet been acted upon, but, if granted, will reduce the 80% credit paid the District of Columbia as aforesaid plus interest on the additionally assessed portion thereof, by \$2,142.96, for which amount claim for refund was made, plus interest paid on that amount from February 16, 1951 to October 15, 1951 in the amount of \$150.00, plus interest on the total amount from October 15, 1951.

WHEREFORE, the petitioner prays that this Court may hear the proceeding, and grant petitioner's claim for refund of \$2,142.96, plus \$150.00 representing excessive interest paid thereon, plus interest on the total from October 15, 1951, and for such other and further relief as the Court may deem appropriate. And petitioner further moves that this case be placed upon the suspense docket pending final determination of petitioner's pending claim for refund of Federal Estate Taxes filed with the Internal Revenue Service.

/s/ Olga Forsberg Donnelly
Olga Forsberg Donnelly
Administratrix, CTA, DBN of the
Estate of Gustave W. Forsberg,
deceased, and Distributee thereof,
and Administratrix of the Estate of
Grace D. Forsberg, deceased, and
Distributee thereof

/s/ Horace J. Donnelly, Jr.
Horace J. Donnelly, Jr.
730 Fifteenth Street, N. W.
Washington 5, D. C.
NAtional 8-5667
Attorney for Petitioner

5 DISTRICT OF COLUMBIA, ss:

Olga Forsberg Donnelly, being duly sworn, says she is the petitioner above named; that she has read the foregoing petition and is familiar with the statements contained therein, and that she verily believes that said statements are true.

/s/ Olga Forsberg Donnelly
Olga Forsberg Donnelly

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 24th day of December, 1953.

/s/ Theresa Buckhantz
Notary Public, D. C.

7 Received Oct 13 1953
Inheritance and Estate Tax Division

Exhibit "B"

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ASSESSOR

Estate of Gustave W. Forsberg, deceased

Estate No. 25324

*Claim for Refund of Inheritance and
Estate Taxes Paid*

Comes now Olga F. Donnelly, Administratrix, CTA, DBN, of the estate of Gustave W. Forsberg, deceased, who claims a refund of District of Columbia estate taxes in the amount of \$2,142.96 together with interest thereon in the amount of \$150.00, overpaid to the Collector of Taxes for the District of Columbia on October 15, 1951, plus interest thereon from that date, and in support thereof states as follows:

9 A

1. Said payment was made on demand of the Office of the Assessor in the amount of \$6,806.73 plus interest in the amount of \$476.47, as shown by the bill and receipt attached hereto as Exhibit "A".

2. Estate tax of \$6,806.73, as shown, was assessed and levied as the balance of the 80% credit determined by the Bureau of Internal Revenue as a credit for payment of local succession taxes, said credit being figured upon the total basic Federal Estate Tax assessed against this estate by the Commissioner of Internal Revenue, including a deficiency of said tax due to a determination of under assessment resulting from increased valuations placed upon real property and securities of said decedent, later recovered assets, and disallowance of a claimed deduction of \$6,098.26 due as commission to the former co-executrix of this estate by virtue of the order of the Probate Division of the United States District Court for the District of Columbia, which had not been paid at the time of audit, but which has since been paid by this estate.

3. Claim for refund of overpayment of Federal estate tax has been duly and timely filed, based upon objection to the Commissioner of Internal Revenue's increase
8 in valuation of certain securities by \$38,512.50; upon evidence that a later recovered asset was in the amount of \$1,805.00 instead of \$2,000.00 as reported in the above referred to audit; and that the disallowed co-executrix's commission in the amount of \$6,098.26 had been duly paid and thus is a proper deductible expense. The claim for refund referred to in this paragraph has not as yet been acted upon, but if granted, will reduce the 80% credit paid the District of Columbia as aforesaid, by \$2,142.96, for which amount claim for refund is herewith made, plus interest from October 15, 1951, together with claim for refund of \$150.00 representing excessive interest paid on October 15, 1951, plus interest thereon from that date.

10 A

And claimant further states that she makes this claim in her own right and as successor Administratrix, CTA, DBN, of said estate, a certified copy of her letters of appointment being attached hereto marked Exhibit "B".

/s/ Olga Forsberg Donnelly
Olga F. Donnelly
Administratrix, CTA, DBN

• • • • •

9

Registered 98583

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of General Administration

Exhibit "C"

October 15, 1953

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mrs. Olga F. Donnelly
c/o Mr. Horace J. Donnelly, Jr.
American Security Building
730 15th Street, N. W.
Washington 5, D. C.

In re: Estate of GUSTAVE W. FORSBERG

Dear Madam:

We are in receipt of your claim for refund of District of Columbia Estate Taxes in the amount of \$2,142.96 together with interest thereon in the amount of \$150.00.

This is to advise you that the claim for refund of said taxes and interest is hereby disallowed.

Very truly yours,

WILLIAM R. MASON,
Assistant Administrator
Inheritance and Estate Taxes

WRM:bs

13

Filed Jan 18, 1954

District of Columbia Tax Court

DISTRICT OF COLUMBIA TAX COURT

ESTATE OF GUSTAVE W. FORSBERG, deceased
Olga Forsberg Donnelly, Administratrix, CTA, DBN,
and Distributee thereof, and as
Administratrix of the Estate of Grace D. Forsberg
and Distributee thereof

Petitioner,

vs.

DISTRICT OF COLUMBIA

Respondent

Docket No. 1413

Petition (As Amended)

The above-named petitioner appeals from a denial of claim for refund of estate taxes assessed and collected against the above-captioned estate, and avers as follows:

1. Jurisdiction of this Court is based upon the Act of August 17, 1937, 50 Stat. 690, as added May 16, 1938, 52 Stat. 371, as amended by the Act of July 26, 1939, 53 Stat. 1108, as amended by the Act of July 10, 1952, 66 Stat. 543, Title 47, Section 2403, District of Columbia Code, 1951 Edition. Petitioner is the administratrix, CTA, DBN, of the Estate of Gustave W. Forsberg, deceased, Administration No. 67,948, in the United States District Court for the District of Columbia, Holding Probate Court, and a distributee named in the will. Petitioner is also Administratrix of the Estate of Grace D. Forsberg, deceased, Administration No. 68,924, in the United States District Court for the District of Columbia, Holding Probate Court, which decedent was the remaining distributee under the will of Gustave W. Forsberg, deceased; and

petitioner is the sole distributee of the Estate of Grace D. Forsberg by operation of law, as sole heir-at-law and next-of-kin of said intestate decedent. The Estate of Gustave W. Forsberg, deceased is designated as Estate No. 25324 for District of Columbia Estate and Inheritance Tax purposes, petitioner has offices at 730 15th Street, N. W., Washington, D. C.

2. The tax in controversy is an overpayment of additional estate tax in the amount of \$2,142.96, plus interest

* * * *

14

Filed Feb 1 1954

District of Columbia Tax Court

Memorandum Relating to Respondent's Motion to Dismiss and Petitioner's Motion to Amend the Petition

The appeal in this proceeding involves an estate tax assessed under Sections 1 and 7 of Article II of Title V of the District of Columbia Revenue Act of 1939 (Sections 47-1608 and 47-1614 of the D.C. Code, 1951 Edition), which read as follows:

"SEC. 1. In addition to the taxes imposed by article I, there is hereby imposed upon the transfer of the estate of every decedent who, after this title becomes effective, shall die a resident of the District, a tax equal to 80 per centum of the Federal estate tax imposed by subdivision (a) of section 301, title III, of the Revenue Act of 1926, as amended, or as hereafter amended or reenacted.

"* * * *

"SEC. 7. The assessor shall, upon receipt of the return and accompanying affidavit, assess such amount as he may determine, from the basis of the return, to be due the District. Upon receipt of a copy of any communication from the Commissioner of Internal Revenue, herein re-

quired to be filed, the assessor shall make such additional assessment or shall make such abatement of the assessment as may appear proper."

The Internal Revenue Service assessed the petitioner a deficiency in Federal estate tax. When the information of such action came to the Assessor, the Assessor under the last part of Section 7 assessed an additional estate tax, which is the subject of this appeal. The facts
15 upon which the petitioner relies as a basis for this proceeding are the following:

"4. (a) The assessment of additional estate tax in the amount of \$6,806.73 (plus interest in the amount of \$476.47), was levied by the Office of the Assessor as the balance of the 80% credit determined by the Bureau of Internal Revenue as a credit for payment of local succession taxes, said credit being figured upon the total basic Federal estate tax assessed against this estate by the Commissioner of Internal Revenue, including a deficiency of said tax due to a determination of under assessment resulting from increased valuations placed upon real property and securities of said decedent, later recovered assets, and disallowance of a claimed deduction of \$6,098.26 due as commission to the former co-executrix of this estate by virtue of the order of the Probate Division of the United States District Court for the District of Columbia, which had not been paid at the time of audit, but which has since been paid by this estate.

"(b) Claim for refund of overpayment of Federal Estate Tax has been duly and timely filed, based upon objection to the Commissioner of Internal Revenue's increase in valuation of certain securities by \$38,512.50; by holding that date of death and not the optional valuation date elected by petitioner's predecessor, was the governing date for determination of valuation; upon evidence that a later recovered asset was in the amount of \$1,-

805.00 instead of \$2,000.00 as originally determined; and that the disallowed co-executrix's commission in the amount of \$6,098.26 had been duly paid and thus is a proper deductible expense of administration.

"(c) The claim for refund referred to in (b) above, has not as yet been acted upon, but, if granted, will reduce the 80% credit paid the District of Columbia as aforesaid plus interest on the additionally assessed portion thereof, by \$2,142.96, for which amount claim for refund was made, plus interest paid on that amount from February 16, 1951 to October 15, 1951 in the amount of \$150.00, plus interest on the total amount from October 15, 1951."

To the petition there was attached a copy of a claim for refund filed with, and denied by the Assessor. The facts in the claim for refund are substantially similar to those quoted from the petition, except that in the claim for refund no detail of any kind is given in respect of the increase of the value of the decedent's property, the claimant merely stating that "deficiency of said tax due to a determination of under assessment resulting from increased valuations placed upon real property and securities of said decedent".

16 The respondent promptly filed a motion to dismiss the petition on the following grounds:

"1. The Court does not have jurisdiction to hear or determine any matter presented in the petition filed herein.

"2. Petitioner failed to exhaust her administrative remedy and, for this reason, this Court lacks jurisdiction.

"3. The petition fails to state a claim upon which relief can be granted."

While said motion was pending the petitioner filed a motion to amend the petition in respect to the jurisdiction by striking out "Act of July 16, 1947, as amended", and inserting in lieu thereof "Act of August 17, 1937, 50 Stat. 690, as added May 16, 1938, 52 Stat. 371, as amended by the Act of July 26, 1939, 53 Stat. 1108, as amended by the Act of July 10, 1952, 66 Stat. 543", that is to say, by alleging that jurisdiction is based upon the Act of August 17, 1937, as amended instead of the Act of July 16, 1947, as alleged originally in the petition. The amendment accompanied the motion to amend. Because this proceeding may be appealed to the United States Court of Appeals for the District of Columbia Circuit, the Court has granted the petitioner's motion to amend and has entered an order to that effect, notwithstanding the Court is of the opinion that the motion to dismiss should be granted. The motion to dismiss will be considered as being addressed to the petition, as amended.

The Court here rules that the fact that the petitioner did not appeal to this Court within 90 days from the assessment of the additional tax in 1951 does not result in lack of jurisdiction because Section 14 of Title IX of the District of Columbia Revenue Act of 1937, as added by the Act of June 10, 1952, merely gives to the taxpayer an additional remedy.

Both the petitioner and the respondent advance the proposition that the Assessor in assessing the additional tax here involved is bound by, or must follow the determination of the Commissioner of Internal Revenue, in other words, if the Commissioner of Internal Revenue should determine, as he did in this case, that there was an additional Federal estate tax due under the Revenue Act of 1926, automatically there was due an additional estate tax to the District of Columbia under the last portion of Section 7 of Article II of Title

V of the Revenue Act of 1939 (Sections 47-1614, D. C. Code, 1951 Edition). If that is so the claim for refund was properly denied because at the time of denial there was no way to determine the validity or propriety of the petitioner's claim for refund. It was all contingent upon a favorable outcome of the claim for refund filed by the petitioner with the Commissioner of Internal Revenue. Likewise, this proceeding is premature, because at the time it was filed it could not be said that the Assessor erred in denying the claim for refund. It may turn out that the Internal Revenue Service is correct in assessing the deficiency.

From the language of Sections 1 and 7 of Article II of Title V of the District of Columbia Revenue Act of 1939, and especially the provision in Section 4 of that article "that the amount of the tax imposed by section 1 of this article shall not be decreased by any failure to secure the allowance of credit against the Federal estate tax", it would seem that the Assessor is charged with the duty of determining the amount of the credit regardless of any determination by the Internal Revenue Service and without being bound thereby. Even if this is so, the petition must be dismissed for the reasons that the claim for refund, as far as the claimed overvaluation of property is concerned, did not state the specific grounds upon which the claim is founded, as required by Section 14(a) of Title IX of the District of Columbia Revenue Act of 1937, as added by the Act of June 10, 1952, which provides that "* * every claim for refund must be in writing, under oath, must state the specific grounds upon which the claim is founded and must be filed with the Assessor * *". Likewise, in connection with

18 the overvaluation of property of the decedent's estate, the petition is defective in that it does not state facts sufficient to permit the Court to determine whether or not the assessment of the additional estate tax was invalid.

An appropriate order will be entered dismissing the petition.

/s/ Jo. V. Morgan
Jo. V. Morgan
Judge

* * * *

19

Filed Feb 1 1954

District of Columbia Tax Court

*Order Granting Petitioner's Motion to Amend
the Petition*

Upon consideration of the Motion of the petitioner to amend the petition filed in this proceeding, and the memorandums of the parties in connection therewith, it is by the Court this 1st day of February, 1954,

ORDERED, that leave be, and it is hereby granted to the petitioner to amend the petition filed herein by striking out the following words and figures: "Act of July 16, 1947, as amended", and inserting in lieu thereof the following words and figures: "Act of August 17, 1937, 50 Stat. 690, as added May 16, 1938, 52 Stat. 371, as amended by the Act of July 26, 1939, 53 Stat. 1108, as amended by the Act of July 10, 1952, 66 Stat. 543".

/s/ Jo. V. Morgan
Jo. V. Morgan
Judge

* * * *

Filed Feb 1 1954

District of Columbia Tax Court

Order Dismissing Petition for Lack of Jurisdiction

Upon consideration of the Motion of respondent to dismiss the petition filed in this proceeding, and of the memorandums of the parties in connection therewith, it is by the Court this 1st day of February, 1954,

ORDERED, that the petition filed in the above entitled cause be, and the same is hereby dismissed for lack of jurisdiction.

/s/ Jo. V. Morgan
Jo. V. Morgan
Judge

Docket Entries

- 12/29/53 Petition filed.
- 1/14/54 Motion to Dismiss filed by Respondent.
- 1/20/54 Petitioner's Answer to Respondent's Motion to Dismiss.
- 1/22/54 Respondent's Memorandum to Petitioner's Answer to Respondent's Motion to Dismiss.
- 2/ 1/54 Memorandum Relating to Respondent's Motion to Dismiss and Petitioner's Motion to Amend Petition. Order granting Petitioner's Motion to Amend Petition. Order Dismissing Petition for lack of jurisdiction.
- 2/16/54 Petition for Review filed by Petitioner.
- 2/17/54 Designation of Record.
- 2/19/54 Respondent's Motion to Strike Portions of Designation of Record. Points and Authorities in support.
- 3/ 2/54 Motion granted.

BRIEF FOR RESPONDENT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,149

ESTATE OF GUSTAVE W. FORSBERG, deceased, etc. *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

ON PETITION FOR REVIEW OF A DECISION OF THE
DISTRICT OF COLUMBIA TAX COURT

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
GEORGE F. DONNELLA,
Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building,
Washington 4, D. C.,



RESPONDENT'S STATEMENT OF THE QUESTION PRESENTED

It is the view of counsel for respondent that the only question presented is: Whether the District of Columbia Tax Court erred in dismissing an appeal from denial of a claim for refund of estate taxes which failed to state a claim upon which relief could be granted, such petition being predicated upon the possibility that at some undeterminable future time, the Commissioner of Internal Revenue might allow, in whole or in part, a claim for refund filed with that office.

Stated otherwise the question is: Does an appeal from denial of a claim for refund of overpayment of estate taxes, based upon a contingency, which may, or may not occur, present a justiciable issue over which the District of Columbia Tax Court has jurisdiction.



INDEX

SUBJECT INDEX

PAGE

Summary of Argument	1
Argument:	
I. <i>The District of Columbia Tax Court correctly determined that the Assessor properly denied petitioner's claim for refund because at the time of such denial, there was no way to determine the validity of petitioner's claim</i>	2
II. <i>The petition to the Tax Court failed to state a claim upon which relief could be granted in that the action was premature and petitioner relied specifically upon some future action of the Commissioner of Internal Revenue</i>	5
Conclusion	7

CASES CITED

<i>Aircraft & Diesel Equipment Corp. v. Hirsch, et al.</i> , 331 U. S. 752, 767 ..	5
<i>American Bonding and Trust Company v. Gibson County</i> , 145 F. 2d 871, 874	6
<i>Art Metal Construction Company v. United States</i> , 47 F. 2d 558	3
<i>Bolger v. Marshall</i> , 90 U. S. App. D. C. 30, 193 F. 2d 37	5
<i>Gold Seal Co. v. Weeks</i> , --- U. S. App. D C ---, 209 F. 2d 802	5
<i>Lewis v. Reynolds</i> , 284 U. S. 281, 283	5
<i>Phoenix Glass Company v. United States</i> , 34 F. 2d 217	2
<i>Porter v. Senderowitz</i> , 158 F. 2d 435	6
<i>Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia</i> , --- App. D. C. ---, --- F. 2d ---, No. 11,736	7
<i>U. S. v. McCord</i> , 233 U. S. 157	6
<i>Werber v. Atkinson</i> , Mun. App. D. C., 84 A. 2d 111	6

STATUTES CITED

Section 14(a) of the Act of July 10, 1952, 66 Stat. 543	2
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MISCELLANEOUS AUTHORITIES CITED

Revenue Act of 1926, Sec. 1113(a), amending Revenue Statute 3226 as amended (26 U. S. C. A. 156)	2
Rule 19(c) of the Rules of Procedure before the District of Columbia Tax Court	6

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,149

ESTATE OF GUSTAVE W. FORSBERG, deceased, etc., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The District of Columbia Tax Court correctly determined that the Assessor properly denied petitioner's claim for refund because at the time of such denial, the claim was based on a contingency, and there was no way for the Assessor to determine the validity of the claim for refund.

The order of the District of Columbia Tax Court dismissing the petition filed herein should be affirmed because the petition was premature, and failed to state a claim upon which relief could be granted, relying as it did upon a contingency which might never occur.

ARGUMENT

I

The District of Columbia Tax Court correctly determined that the Assessor properly denied petitioner's claim for refund because at the time of such denial, there was no way to determine the validity of petitioner's claim.

Section 14(a) of the Act of July 10, 1952, 66 Stat. 543, in providing for refund of overpayments of taxes states that "every claim must be in writing, under oath, must state the specific grounds upon which the claim is founded and must be filed with the Assessor." As may be seen from Exhibit "B", (Joint Appendix 8A), the claim for refund of petitioner states no grounds for a refund of the tax but is merely a statement that a claim for refund of overpayment of Federal estate taxes has been made based upon objection to the Commissioner of Internal Revenue's increase in valuation of certain portions of the estate. It is true, as contended by petitioner, that this is a case of first impression relating to the interpretation of the refund provisions of the Act of July 10, 1952, *supra*, with respect to estate taxes, but there are numerous cases decided by various Federal Appellate Courts construing Federal Tax Statutes which respondent believes analogous and controlling.

In *Phoenix Glass Company v. United States*, 34 F. 2d 217, a claim for refund of income taxes paid stating that an appeal was pending before the Board of Tax Appeals *which might* affect claimants actual liability and that, in the event that favorable action was taken by the Board, claimant requested that any overpayment of taxes as determined by the Board should be refunded, was held insufficient under the Revenue Act of 1926, Sec. 1113(a) amending Revenue Statute 3226 as amended (26 U. S. C. A. 156). This regulation provided that claims for refund by the taxpayer for refund of taxes should be made on a cer-

tain form and that "All facts relied upon in support of the claim should be clearly set forth in detail under oath." On this state of facts, the Court decided that the claim for refund did not allege any ground or basis for the refund and a demurrer to the action by the Phoenix Glass Company was sustained.

In *Art Metal Construction Company v. United States*, 47 F. 2d 558, (C. C. A. 2), judgment for plaintiff in District Court was reversed and petition dismissed, under these circumstances: A claim for refund contained the following: "This claim is filed pursuant to the provisions of section 252 of the Revenue Act of 1921, as amended by the Act of March 4, 1923, for the refunding of any sum which, by reason of future Court Cases, Treasury Rulings, or for other reasons, it may appear has been illegally or erroneously assessed or collected. The purpose in submitting this claim is to protect the taxpayer's rights in respect of the time within which such claims must be filed."

Judge Hand in commenting on this type of claim said:

"The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim should something turn up, either because of a change in the rulings of the Courts, or of the Department, or for any other reason which might lead him to suppose that he could get back what he had already paid."

"* * * To allow him to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether."

Prescinding for the moment, from the above cases, the circumstances of this case lead to the inescapable conclusion that the Assessor's action in denying the claim for re-

fund could in no way be deemed to be arbitrary, capricious, and unwarranted as alleged by petitioner, but rather, the Assessor had no choice but to deny the claim since the existence of the claim was at the time of filing and is, even now, based upon a contingency, which may never occur. That the petitioner characterizes the action of respondent as "the pinching of technicalities" and requests this court to decide the questions raised by this case "uninhibited by the legal niceties and technicalities advocated by the respondent," is in effect nothing more than a demand that this court completely ignore the plain language of the applicable statutes of Congress and depart from settled legal principles in its decision of this case. The fact remains, as stated by petitioner in its statement of the case that, "This claim for refund was based upon the claim for refund of Federal estate taxes, which claim had not then (and has not yet) been acted upon, * * *" (Petitioner's Brief, Page 3).

Petitioner further says (Brief, Page 12), that the respondent's entire course of action with respect to petitioner, has been arbitrary, capricious and unwarranted. This assertion is entirely erroneous. In the first place, petitioner had the right to appeal to the Board of Tax Appeals for the District of Columbia as well as to the Tax Court of the United States within ninety days after the assessments on the questions here involved and no reason appears why petitioner did not do so. The action of the Assessor in disallowing petitioner's alleged claim for refund was wholly in accordance with law as set forth in the cases cited in this brief on the subject. Petitioner's remedy which was available before the Board of Tax Appeals for the District of Columbia was an administrative remedy inasmuch as this court held in *Watrous v. District of Columbia*, 77 U. S. App. D. C. 295, 135 F. 2d 654, that such tribunal was an administrative agency and a constituent

member of the taxing authority. No one is to blame for petitioner's predicament except the petitioner. Failure to exhaust this remedy deprived the Board of Tax Appeals of jurisdiction over the assessment. *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.*, 331 U. S. 752, 767; *Bolger v. Marshall*, 90 U. S. App. D. C. 30, 193 F. 2d 37.

II

The petition to the Tax Court failed to state a claim upon which relief could be granted in that the action was premature and petitioner relied specifically upon some future action of the Commissioner of Internal Revenue.

This court in *Gold Seal Co. v. Weeks*, ____ U. S. App. D. C. ____, 209 F. 2d 802, dealt exhaustively with the subject of whether a claim for relief indicated the existence of a cause of action. By cause of action is meant a claim that facts exist which, under our legal system, are recognized as entitling claimant to judicial action in vindication of a right or of remedying a wrong, and courts are not authorized to require a party defendant to defend against a "cause" not recognized by law as involving vindication of a legal right or the remedying of a legal wrong. In the instant case, petitioner has shown no legal right to any monies paid by her to respondent, and consequently, it follows that petitioner can show no violation of any right in petitioner by respondent.

It is axiomatic that one of the conditions to the maintenance of a suit for refund of overpayment of taxes, being in the nature of an action for money had and received, that the District of Columbia be in possession of money which rightfully belongs to the taxpayer. *Lewis v. Reynolds*, 284 U. S. 281, 283, 76 L. Ed. 293, 52 S. Ct. 145.

Petitioner relies solely upon a contingency which may never occur, i.e., the possible favorable outcome of a claim

for refund filed by the petitioner with the Commissioner of Internal Revenue. The rule of law is well established that a plaintiff can not recover unless the facts which constitute his cause of action are in existence at the time he begins his suit. *Werber v. Atkinson*, Mun. App. D. C., 84 A. 2d 111; *Porter v. Senderowitz*, 158 F. 2d 435, (CCA 3); *U. S. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893. The rule is succinctly stated in *American Bonding and Trust Company v. Gibson County*, 145 F. 871, 874 as follows:

“Plaintiff’s right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit.”

The complete lack of any right in the petitioner in her claim for refund submitted to the Assessor, was in no wise eliminated by the petition to the District of Columbia Tax Court. The obvious failure of petitioner to state a cause of action constitutes a fatal defect which, of necessity, precludes petitioner from stating a ground upon which relief could be granted.

Petitioner’s prayer for relief to the Tax Court was that this case be placed upon the suspense docket pending final determination of petitioner’s pending claim for refund of Federal estate taxes filed with the Internal Revenue Service. (Joint App. 7A). Petitioner further, in its brief on this appeal, (p. 15) prays that this court vacate and set aside the order of the District of Columbia Tax Court with instructions to place the case on the suspense calendar pending final action by the Internal Revenue Service on petitioner’s claim for refund of estate taxes filed with the Internal Revenue Service. Petitioner’s reference to the suspense calendar and suspense docket presumably has reference to Rule 19(c) of the Rules of Procedure before

the District of Columbia Tax Court having to do with calendars. Rule 19(c) (CCH, District of Columbia Tax Service, Par. 13-820) provides:

“Reserve calendar.—A *proceeding which is at issue* may be placed upon the reserve calendar for good cause, as, for example, to await the decision of a court in a pending case.” (Italic supplied).

Of course, in this case there is no cause of action and, accordingly, nothing can possibly be “at issue” in this proceeding.

Petitioner contends (Pet. Brief, Page 14) that the period of limitations for a refund of overpayment of District of Columbia taxes is less than that conferred by Congress for the Federal estate tax. That involves a question of policy for Congress, *Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia*, ____ App. D. C. ____, ____ F. 2d ____, No. 11,736, decided April 15, 1954, and that policy can not be circumvented by the device of using a suspense calendar to toll the period of limitations applicable until such time as it can be determined whether the petitioner does or does not have a claim.

CONCLUSION

As will be seen from petitioner’s brief in this case, and the memorandum opinion of the District of Columbia Tax Court (App. 12A, 16A), no basis for petitioner’s claim existed when petitioner’s claim for refund was filed with the Assessor or when the appeal was filed by the petitioner with the District of Columbia Tax Court, and no cause of action exists now (petitioner’s brief, page 3) which could be the basis of a decision by the Assessor, the District of Columbia Tax Court, or this Court whereby petitioner would be entitled to a refund of any part of the taxes paid.

It is respectfully submitted that the order of the District of Columbia Tax Court dismissing the petition for lack of jurisdiction should be affirmed.

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